

NATURE OF PROCEEDINGS

This proceeding is appeal from the North Dakota Public Service Commission, Case No. PU-1564-99-17, wherein the Public Service Commission (PSC) held that it was federally preempted from imposing any requirement on Western Wireless Corporation for a Certificate of Public Convenience and Necessity for its Wireless Residential Service (WRS) in Regent, North Dakota, because such service was a "mobile" service.

THE PARTIES AND THE PRINCIPAL FACTS

Western Wireless Corporation (Western Wireless) aka Cellular One provides mobile cellular telephone service in North Dakota under licenses issued by the Federal Communications Commission.

Consolidated Telephone Cooperative (Consolidated) provides landline local exchange telecommunications service in a number of local exchange areas in the counties of Adams, Billings, Bowman, Dunn, Hettinger, McKenzie, Slope and Stark in southwestern North Dakota, under certificates of public convenience and necessity issued by the North Dakota PSC pursuant to the provisions of Chapter 49-03.1, NDCC. Regent is one of the communities served by Consolidated.

"Cellular" is a term commonly used to describe a certain category of telecommunications service. Cellular service is included in the definition "commercial mobile service", 47 U.S.C. 332(d)(1) and its synonym "commercial mobile radio service" (CMRS), 47 C.F.R. 20.3 and 20.9. Radio telephone service is commonly called "wireless", as distinguished from wired service which is also called wireline or landline service. "Cellular" usually connotes commercial mobile radio in a certain spectrum. (Tr., pp. 75-76, 112-113). Under Section 332 of the Telecommunications Act, no state or local government has authority to regulate market entry of or the rates charged by any provider of commercial mobile service.

On August 21, 1998, Western Wireless submitted an Access Service Request ("ASR") to Consolidated for 2000 direct inward dialed numbers and a local T-1 circuit with six trunks at Regent, North Dakota. (TR 125) The ASR did not indicate that the service would be used for the provision of fixed service by Western Wireless. (TR 126) Consolidated had previously provided similar

service to Western Wireless for its cell site located in Consolidated's Bowman exchange for use by Western Wireless cellular mobile customers. (TR 127) The service requested was installed and turned up for service on September 18, 1998. (TR 125).

On January 7, 1999, Western Wireless initiated "Wireless Residential Service" (WRS) a wireless local loop offering designed to compete with the local services offered by Consolidated in Regent. These services were made possible by Western Wireless' purchase from Consolidated of a local DID trunk to route calls from Consolidated's customers to Western Wireless' customers, along with Consolidated's assignment to Western Wireless of 2000 local telephone numbers. (See Western Wireless complaint, page 3).

On January 11, 1999, upon learning that Western Wireless was using the service for fixed wireless residential service without a certificate of public convenience and necessity, Consolidated disconnected DID service to Western Wireless. Western Wireless complained to the PSC, requesting that reconnection be ordered and that penalties and fines be assessed against Consolidated. On February 1, 1999, Consolidated reconnected the service pending resolution of Consolidated's counterclaim that Western Wireless has engaged in competitive local exchange carrier activities without proper authority.

The WRS service offered by Western Wireless is provisioned by providing each subscriber with a "black box" approximately the size of a lap top computer which is designed to be hung on a wall. (TR 67) The box functions as a radio transmitter and receiver, but requires the connection of a standard telephone and power either from a standard outlet or its internal batteries in order for a subscriber to place or receive calls. (TR 32, 87) Although the box is transportable, it is not designed or intended to be used in mobile services. (TR 87)

On August 31, 1999, the PSC entered its Findings of Fact, Conclusions of Law and Order. Consolidated challenges the following Findings and Conclusions:

(1) Finding of Fact No. 38:

The Commission finds WRS has mobile capabilities and is therefore a mobile service.

(2) **Finding of Fact No. 39:**

As a mobile service, WRS is exempt from state entry regulations.

(3) **Conclusion of Law No. 3:**

North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service as provided in 47 USC §332(c)(3)(A).

(4) **Conclusion of Law No. 4:**

Any requirement for a Certificate of Public Convenience and Necessity under NDCC Chapter 49-03.1 is federally preempted.

ISSUES

- A. Did the North Dakota Public Service Commission commit reversible error when it found that Western Wireless Corporation's WRS offering was a mobile service?
- B. Did the North Dakota Public Service Commission commit reversible error in concluding that it was federally preempted from requiring Western Wireless Corporation to obtain a Certificate of Public Convenience and Necessity for its WRS offering in Regent, North Dakota?

ARGUMENT

- A. The North Dakota Public Service Commission erred in finding that the WRS provided by Western Wireless in Regent, North Dakota, was a "mobile" service.

Section 332(c)(3) of the Federal Telecommunications Act provides:

[N]o state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ."

It is uncontested that if the Wireless Residential Service Western Wireless is offering in Regent, and intends to offer statewide, is a "commercial mobile service" as defined by federal law, then entry regulation by the PSC is prohibited.

Although the WRS service is asserted to be designed to provide an alternative to the local exchange service offered by wireline telephone companies, Western Wireless in this case has attempted to "spin" the nature of its offering to be able to squeeze it into the mobile definition. There is no dispute that the offering is "commercial" or that it is a "service". However, it strongly disputed that the offering is a "mobile service". Western Wireless argued that because the subscriber premise equipment can be transported from one residence to another, and can operate on batteries instead of house current, the service offered is a "mobile service". Despite these attempts to torture the language, the Communications Act and FCC regulations have something else in mind.

The Act defines "mobile service" as:

[R]adio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . . 47 U.S.C. 153(27).

"Mobile station", in turn is defined as:

A radio-communications station capable of being moved **and which ordinarily does move.** (Emphasis supplied)

Thus, although the "black box" which Western Wireless places on the subscriber premises to complete its wireless loop may be "capable of being moved", it is neither intended nor suitable to "ordinarily move." (TR 87) It takes no more than common sense and every day knowledge to understand that "ordinary" users with a need for mobile communications will not carry with them a box the size of a laptop computer and a regular telephone, when shirt pocket sized mobile units are readily available on the market.

Western Wireless offered no testimony as to whether the subscriber unit was capable of communicating outside the range of the cellsite in which it was located, i.e. whether it could be handed off to another cell. There was also no testimony in the record as to the battery life or the ability of the unit's antenna to function in a vehicle.

In fact, it would be strange if Western Wireless intended its WRS units to "ordinarily move" since the effect would be to cannibalize its real mobile service. Since the WRS offers unlimited calling for \$14.99 per month, customers to the mobile service with similar calling scope requirements would abandon that service which charges on a per minutes basis.

The essence of Western Wireless's position appears to be that regardless of its operational characteristics, the Wireless Residential Service is exempt from state entry regulation under Section 332(c)(3) either because the FCC has characterized it as a commercial mobile service, or because the FCC considers the service "ancillary" to a commercial mobile service and therefore legally a mobile service, whether or not it is, in fact, mobile (TR 16-17). Both of these claims are wrong.

Consolidated does not dispute the claim that Western Wireless's cellular license allows it to provide fixed service on a "co-primary" basis with its mobile offering. The FCC decision expanding the authority of licensees explicitly did not resolve the issue of the regulatory status of such service. "[F]urther development of the record is needed to resolve the issue of how fixed services . . . should be regulated." WT Docket 96-6, 8/1/96, Para. 39, *see also*, Paras 47, 48.

Counsel for Western Wireless acknowledges that the issue of the regulatory status of fixed wireless service, other than ancillary, auxiliary and incidental is the subject of an open FCC proceeding. In its order asking for comments, the FCC explicitly

recognized that it needed further public comment before reaching any conclusions. The FCC also recognized the possibility that such determinations might have to be made on a case by case basis.

The FCC did request comments on a proposal to establish a rebuttable presumption that any wireless service offered by a CMRS licensee would be considered a mobile service, however, no such rule has been adopted and the North Dakota Public Service Commission is under no compulsion to follow proposed rules. It remains that there is no rule in effect on this issue at this time.

The Commission's decision in this case, and the FCC's "CMRS Flexibility Order" on which the PSC relies, both ignore the statute's words "and" and "ordinarily does move." This agency action - by the FCC or by the PSC - both fail to conform to authoritative principles of statutory interpretation affecting the issue of federal preemption of state jurisdiction.

B. **The North Dakota Public Service Commission erred when it concluded that it was federally preempted from requiring Western Wireless to obtain a Certificate of Public Convenience and Necessity for its Wireless Residential Service (WRS).**

The United States Supreme Court has established the principles and process of analysis to determine whether federal action (by Congress or an authorized agency) has the effect to preempt states' action affecting the same subject. ***Louisiana Public Service Commission v. FCC***, 476 U.S. 355, 106 S. Ct. 1890 (1986). In ***Louisiana***, as in this case, the central issue was whether FCC action under the Communications Act has the purpose and effect to preempt state jurisdiction - state jurisdiction that unquestionably exists unless federal authorities have taken preemptory action.

In its decision in this case, the North Dakota PSC did not correctly apply ***Louisiana*** analysis to the preemption issue. As stated in the ***Louisiana*** decision, there are several ways ("varieties") by which federal action might preempt states from acting in the same subject area, always guided by the foundation principle:

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." 106 S. Ct. at 1899.

As explained by the Court in *Louisiana*, "Pre-emption occurs

- [1] when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,
- [2] when there is outright conflict between federal and state law,
- [3] where compliance with both federal and state law is in effect physically impossible,
- [4] where there is implicit in federal law a barrier to state regulation,
- [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or
- [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.
- [7] Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation ... **[But] only when and if it is acting within the scope of its congressionally delegated authority."**

106 S. Ct. at 1898 and 1901. (Citations omitted; numbered brackets added for convenience; emphasis added.)

Even though the PSC did not cite *Louisiana*, it is evident from the language in its decision that the Commission concluded that "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service...." (Conclusion of Law No. 3) as if the Commission had deliberated under the preemption type 7. The Commission did not conclude that it is federally preempted under any of preemption types one through six. Given the system of dual federal and state regulation of telecommunications, there is no purpose in extended discussion about the inapplicability of preemption types 2 through 6. And given the Commission's reliance on type 7 preemption by FCC action, there is no purpose in extended discussion about type 1 preemption based solely on words of the acts of Congress.

The Commission's preemption Conclusion of Law (No. 3) and the related ultimate Finding of Fact (No. 38) that "... WRS [wireless residential service] has mobile capabilities and is therefore a mobile service" are erroneously based on the FCC's statements in two reports and orders affecting permissible uses of licensed wireless telephone spectrum, cited in Findings of Fact Nos. 35 and 36.

If the Commission had adapted the words of the *Louisiana* decision to articulate its type 7 decision, it might have said: "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service not as a result of action taken by Congress itself but by the FCC acting within the scope of its congressionally delegated authority." But, regardless of the words used to declare the Commission's decision that North Dakota is federally preempted by type 7 action, that decision is simply and plainly erroneous for the single and simple reason that the FCC **has not acted** to preempt state regulation!

The so-called "CMRS Flexibility Order" (cited by the Commission in Finding No. 36) is the closest thing to "action" by the FCC addressing the type 7 preemption issue, whether state jurisdiction has been preempted by the FCC acting within the scope of its congressionally delegated authority under the Communications Act. To paraphrase the words of the *Louisiana* decision, preemption has not occurred, because of the absence of a clear expression by Congress. Neither has preemption occurred as a result of the FCC acting within the scope of its congressionally delegated authority - **because the FCC has not acted at all on the specific issue of wireless residential service**. In the Flexibility Order, the FCC specifically abstained from acting to preempt state regulation of wireless residential service. First Report and Order and Further Notice of Proposed Rulemaking, June 27, 1996, WT Docket No. 96-6 FCC 96-283. Type 7 preemption has not occurred because the federal agency has not taken any preemptive action on this issue.

There is no denying the 1996 FCC's Flexibility Order signaled its leaning towards action to claim preemption authority, excluding states' jurisdiction (consistent with the federal agency's long-standing record of assaults on states' jurisdiction over intrastate telecommunications by any technology). But the FCC's proposal of rules is not the legal equivalent of the adoption of rules to preempt states' jurisdiction. If there is no type 1 preemption because there is no clear congressional expression, then there can be no type 7 preemption rule where the related federal agency has not clearly exercised delegated power to preempt state jurisdiction.

If the FCC's 1996 Flexibility Order and Notice of Proposed Rulemaking is to have any effect on the Commission's disposition of this case, the Commission's decision should not be "we regard the FCC as having acted to preempt state authority." On the contrary, in fulfillment of its responsibilities to North Dakota, the

Commission's position should be: "After three years of not acting on its proposed rules, we acknowledge the FCC has not acted to preempt state jurisdiction to regulate wireless residential service. Type 7 preemption has not occurred."

Even if the "CMRS Flexibility Order" had been enacted rather than merely proposed - indeed, even if the FCC had intervened or participated in this case on an amicus basis to make such a claim - even in those circumstance the PSC should have performed its duty to enforce North Dakota law and reject any preemption claim as an overreaching of the FCC's authority under applicable federal statutes and court precedents.

As stated in the *Louisiana* case, type 7 preemption occurs only when and if the federal agency is acting within the scope of its congressionally delegated authority. "An agency may not confer power on itself." *Louisiana*, 106 S. Ct. 1901. As reiterated in a Court's 1999 decision affecting the 1996 Act, the important distinction is whether the FCC has explicit rulemaking authority given to it by Congress. *A.T.&T. v. Iowa Utilities Board*, 119 U.S. 721, n.7 (1999). Where agency action does not conform to the plain meaning of a statute, or where an agency's construction of a statute is arbitrary, capricious or manifestly contrary to the statute, the agency interpretation will not be sustained. *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 104 S. Ct. 2778 (1984); *Texas Office of Public Utility Counsel et al. v. Federal Communications Commission* (5th Cir. July 30, 1999, in Case No. 97-60421).

Section 49-03.1-01, NDCC, states that no public utility shall begin operation of a public utility system without first obtaining from the PSC a certificate of public convenience and necessity (PCN). Western Wireless is within the definition of a public utility as defined in §49-03.1-02(2), NDCC.

Section 49-21-08, NDCC, states that when a telecommunications company furnishes adequate local service and supplies the reasonable wants of a community in which it is operating, the PSC shall not grant any other company the right to compete in the provision of local exchange service until after a public hearing and a finding that the public convenience and necessity may require such competing plant.

The North Dakota Century Code provides no discretion to the PSC which would allow it to excuse Western Wireless from the

requirement to obtain a certificate prior to operating telecommunications facilities. Thus, there is no basis for Western Wireless to claim exemption from the PCN requirement on the ground that the burden of filing an application deters it from entering the market to compete for business. Even if, *arguendo*, the PSC had such authority, it would be harmful to competition to exempt some carriers, whether competitive or incumbent, and not others from the requirements. The PSC must enforce the law in a competitively neutral manner.

On October 22, 1997, the PSC granted Western Wireless's subsidiary Eclipse Communications Corporation application for a PCN certificate to provide local exchange service on a facilities, resale, or combination basis throughout the state. (Case No. PU-1693-97-269). On September 25, 1997, the PSC granted a similar application by AT&T of the Midwest. (Case No. PU-453-96-84) On May 31, 1996, the PSC granted the application of Consolidated's subsidiary, Consolidated Communications Networks, Inc., for PCN certificates to provide local exchange telecommunications services. None of these applicants claimed that the certificate process constituted an undue burden or created a barrier to entry.

The prior provision of cellular mobile service over the same facilities does not excuse the failure to obtain a certificate. The WRS of Western Wireless essentially uses the same infrastructure that Western Wireless has been using to provide analog mobile cellular service, except that specialized customer premises equipment is required to complete the radio circuit. The customer then connects a standard telephone to this equipment. Western Wireless was able to construct and operate the cellular mobile system without a PCN certificate because that service is exempt from state entry and rate regulation (with exceptions not relevant here) by 47 U.S.C. 332(c)(3).

Assuming, for this discussion, that that exemption is not available to the WRS service, the existence of the preexisting exempt service and facilities does not excuse Western Wireless from the requirement to obtain a certificate prior to offering this service. The purpose of the statute is to protect the public interest by ensuring that services vital to health and welfare of the public are provided by entities which are technically and managerially capable and financially sound. Section 49-03.1-04, NDCC. Without such protection, the operational or financial collapse of a carrier could leave a significant segment of the population at risk.

Cellular mobile and fixed residential service are two distinct markets with distinct public interest evaluations. Although it has grown rapidly, cellular mobile has not become a ubiquitous, essential service in the way a telephone in the home is established. North Dakota, in fact, has one of the highest subscriber penetration rates in the country for local telephone service.

Where a carrier constructs and operates a facility for an exempt purpose it is not excused from obtaining a certificate before it begins operating the facility for a non-exempt purpose. Otherwise an entity seeking to avoid the law's requirements could simply construct and operate a non-public facility, then convert it to public use.

In any event, the WRS service requires additional construction beyond the existing cellular mobile infrastructure. In order for a subscriber to communicate to and from his or her residence, the black box must be placed in the residence in order to complete the radio circuit. A subscriber with a mobile telephone cannot use the service.

The core issue in this case is whether Western Wireless is obliged to comply with public convenience and necessity principles and processes under North Dakota's statutory law.

This case is not about Western Wireless' entry into the mobile telecommunications business. Under Section 332(c)(3) of the Communications Act of 1934, as amended in 1996, no state has authority to regulate market entry by any commercial mobile service provider. Western Wireless has federal licenses to provide mobile cellular telecommunications service in North Dakota and it is active in that business.

This case is about Western Wireless' entry into the business of providing telecommunications service to fixed locations in competition with incumbent landline local exchange carriers. This case is like the many filed since February of 1996 where facilities based CLECs have applied for certificates of public convenience and necessity to provide local exchange telecommunications service in North Dakota. Indeed, a wholly owned Western Wireless subsidiary named Eclipse Communications Corporation has applied for and received such a certificate. See also Western Wireless' complaint in this case, paragraph 6 which reads: "Western Wireless WRS offering provides consumers in Regent

with a competitive alternative to local exchange service offered by Consolidated Telephone."

This case is about Western Wireless' entry into the local exchange telecommunications business even though Western Wireless has not applied for a certificate of public convenience and necessity.

What is different about this case is that Western Wireless asserts the federal law preempting state regulation of commercial mobile radio service also preempts state regulation of fixed wireless service. According to Western Wireless, it does not need a PCN certificate under applicable state law to provide wireless service to fixed locations. In Western Wireless' words: "...wireless residential service is exempt under 47 USC Section 332(c)(3)(a) from state entry and rate regulation because, as a cellular service offering, it is classified as a commercial mobile service, or CMRS." (Transcript, p. 13; opening statement of Western Wireless' legal counsel.) Western Wireless' claim of exemption is explained in its Answer and Motion to Dismiss Counterclaim, p. 3:

"Second, WRS is exempt from state entry and rate regulation under Section 332(c)(3)(A), because it is CMRS. WRS is not merely a fixed service - it includes a significant mobile component and can best be characterized as a hybrid fixed/mobile service. WRS is provisioned using a hybrid fixed/mobile network architecture, consisting of customer premise equipment ('CPE') that allows for the use of existing telephones and other household devices. The CPE simulates 'dial tone' and can be connected to household telephones, facsimiles, and other devices in the home. The CPE operates using AC power (which can be plugged into an electrical outlet anywhere), has battery back-up power (which allows full mobility), and can be connected to a small 5-inch antenna or a large high-gain antenna. This hybrid fixed-mobile service, which uses the cellular network infrastructure, including switching, trunking, cell site equipment, and antenna towers, is clearly CMRS."

Western Wireless' pleadings' factual description of WRS is fully supported by the record of evidence with the important exception that WRS lacks a "significant mobile component." (TR pp.

85-95; 106-107.) Western Wireless is wrong in declaring that fixed WRS is CMRS. It is wrong because the M in CMRS means mobile; WRS may be transportable **but it is not mobile.**

There is substantial legal authority to dismiss Western Wireless' assertion that fixed wireless service and mobile wireless service are one and the same insofar as a state's regulatory powers are concerned.

First, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines mobile service and mobile station in words that foreclose any credible argument that fixed residential service is mobile. 47 U.S.C. 153 (27) and (28). That definition is (emphasis added):

"The term 'mobile station' means a radio-communications station capable of being moved **and which ordinarily does move.**"

Western Wireless' description of WRS bears repeating:

"WRS is provisioned using a hybrid fixed/mobile network architecture, consisting of customer premise equipment ('CPE') that allows for the use of existing telephones and other household devices. The CPE simulates 'dial tone' and can be connected to household telephones, facsimiles, and other devices in the home. The CPE operates using AC power (which can be plugged into an electrical outlet anywhere), has battery back-up power (which allows full mobility), and can be connected to a small 5-inch antenna or a large high-gain antenna."

The telecommunications service involved in this case is described and marketed by Western as "wireless residential service," in competition with local exchange service available to the same residential locations. Surely the word "residential" - adopted by Western and accepted by the PSC to describe the service involved in this case - denotes service to fixed, immobile stations. The evidence supports that ordinary meaning of the word "residential."

Wireless residential service is provided with equipment that fits a residential setting - AC power and standard desktop telephone sets plus a Tellular device to transmit and receive radiotelephone transmissions. "Battery power provides mobility

that allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors . . . even though . . . the Tellular unit is heavy and awkward compared to hand-held wireless phones and must be connected to a traditional telephone set. There are no handles or other conveniences that would indicate the unit was designed or intended for mobile use." Findings of Fact Nos. 33 and 34. Even the PSC did not believe that it was designed or intended to be moved. Despite these fixed non-mobile characteristics of wireless residential service, the Commission found . . . WRS has mobile capabilities and is therefore a mobile service" and "as a mobile service, WRS is exempt from state entry regulation." Findings of Fact Nos. 38 and 39.

Congress has defined a mobile station as a wireless telecommunications station that is "capable of being moved **and which ordinarily does move.**" 47 U.S.C. § 153(28). This definition is statutory law enacted by Congress and prevails over any definition adopted by any agency, including the FCC. Despite this uncomplicated definition containing two elements, the PSC apparently deems itself constrained by some statements (not formally adopted rules) of the FCC that lead the PSC to declare that "WRS has mobile capabilities and is therefore a mobile service." What happened to the "ordinarily does move" element of the statutory definition? How can it be that the FCC or the North Dakota PSC disregards the ordinary meaning of the words of the controlling statute: "and" and "ordinarily does move"?

Second, as fully documented by witness Douglas Meredith in his testimony, the FCC has never issued any rules, regulations, orders, or opinions that equate fixed wireless and mobile wireless services so as to foreclose state regulation of fixed wireless service. Indeed, Western Wireless admits the FCC has not classified fixed wireless service as included in the statutory definition of mobile service. The FCC has proposed rule making to address the relationship between CMRS and fixed wireless service and regulatory treatment. The FCC has not made any rules that would classify fixed wireless service as CMRS (mobile) service. (See First Report and Order and Further Notice of Proposed Rule Making WT Docket No. 96-6, August 1, 1996, referred to by Commissioners at TR, pp. 104-106 and 114-115. See Western Wireless Answer and Motion to Dismiss Counterclaim, p. 4.)

Third, the entire import of the FCC's orders and regulations cited in the course of these proceedings, including the latest (1996) Order that Western Wireless has dubbed as a "CMRS

Flexibility Order" is this, and only this: Historically, federal licenses for radio/wireless telecommunications in spectrum allocated and licensed for CMRS were restricted to mobile applications. With the passage of time and developments in technology, licenses in this spectrum are no longer restricted to mobile applications, as a matter of federal law. But the removal of the former federal restrictions on the use of the spectrum does not displace state regulation when spectrum is used for service to fixed locations.

The FCC's decision to allow carriers to offer co-primary fixed services on spectrums allocated for CMRS does not alter regulatory treatment of fixed services that have been provided by CMRS providers under prior rules. (TR 79) In the CMRS Second Report and Order, ancillary, auxiliary and incidental services offered by CMRS providers fall within the definition of mobile services subject to CMRS regulation. (TR 79, 80) The FCC is, however, seeking further comment on regulatory treatment of such fixed services that may not be considered ancillary, auxiliary or incidental to mobile service. (TR 80)

Where a licensee pursues a business purpose of mobile telephony, it may do so free of state market entry or rate regulation, under 47 U.S.C. 332. Where a licensee pursues a business purpose of radio/wireless telephony to serve locations ("stations") that are fixed and not mobile as defined in the Act, it may do so subject to applicable state laws. That is clear from Section 332 itself, which includes references to Sections 152(b) and 221(b) of the Act, preserving state authority in the dual system of federal and state regulation of telecommunications.

Fourth, the plain meaning of the word "mobile" as used in the Act does not denote congressional preemption of states' power to regulate market entry by providers of wireless service to fixed locations. Nor has the FCC attempted to preempt states' regulation of wireless telecommunications to fixed locations. In these circumstances, and to borrow a phrase from Justice Scalia's opinion in the Supreme Court's January 1999 decision upholding certain powers of the FCC under the Act, it is "surpassing strange" that Western Wireless should engage in the Orwellian exercise to claim that wireless service to fixed residential locations is the same as wireless service to mobile stations.

If there were any uncertainty about the strange question whether telephone service to a fixed residence is mobile service,

all the evidence presented by Western Wireless in this and in the other case shows the answer. Wireless telephone service to a fixed residence is not mobile service.

Fifth, in our nation's federal/state dual system of regulation, each state has the legal power to regulate fixed service market entry by telecommunications companies. In North Dakota, this power has been delegated to the PSC. Sections 49-02-01; 49-03.1, NDCC, et. seq. The PSC is responsible to exercise this authority - not to deny it - and is responsible to sanction violations. Section 49-03.1-08, NDCC. The Federal Congress has not acted to take away this state jurisdiction. 47 U.S.C. 253 and 332. Though it floated a trial balloon in proposed rule-making in 1996, the FCC has not attempted to pre-empt state jurisdiction. The matter is on the back burner (TR, p. 115) and apparently cold, not simmering. Lacking definitive action by the FCC (or by Congress), Western Wireless' arguments that there is no state jurisdiction over fixed wireless telecommunications service are just plain wrong. And so it is evident that Western Wireless' assertions in the PSC proceedings are wholly unsupported as a matter of law.

The North Dakota PSC should have exercised its existing authority, rather than assume that preemptive authority will be claimed by the Federal agency.

SUMMARY and CONCLUSION

Even though the telecommunications regulatory climate has changed in the direction of deregulation, telecommunications remains a regulated industry under both federal and state laws. Radio spectrum is licensed only by the FCC. The use of radio spectrum for wireless mobile telephone service is not subject to state rate and entry regulation. Federal regulations do not restrict the use of radio spectrum for wireless telephony to mobile service; radiotelephony to fixed locations is permitted under federal regulations.

The use of radio spectrum for fixed telephone service is also subject to state regulation. Specifically, under section 332 of the Act, mobile wireless service is federally licensed and states have no jurisdiction as to market entry or rates. The plain meaning of the word "mobile," the preservation of state authority (47 U.S.C. 152(b), 221(b) and 253(b), and the provisions of North

Dakota's telecommunications statutes (NDCC 49-03.1 affecting certification of public convenience and necessity) combine to compel this conclusion: North Dakota's statutory PCN processes apply equally to wireless and wireline providers of facilities based telecommunications service to fixed stations.

The M in CMRS means mobile. The preemption of CMRS under 47 U.S.C. 332 does not exempt Western Wireless' fixed wireless service from state regulation, including the requirement that service not be offered without a certificate of public convenience and necessity, under NDCC 49-03.1. Just as its Eclipse subsidiary is required to and has obtained a certificate, so also Western Wireless itself is required to obtain a certificate of public convenience and necessity before utilizing its wireless infrastructure to provide telecommunications service to fixed locations.

The essence of the North Dakota Commission's decision in this case is "... WRS has mobile capabilities and is therefore a mobile service" and "as a mobile service, WRS is exempt from state entry regulation." Findings of Fact Nos. 38 and 39. The PSC has entirely ignored the additional component of the statutory definition "and which ordinarily does move."

Apparently, the PSC reached its decision in reliance on the FCC's "CMRS Flexibility Order" and related proposed rules. But the FCC has not acted to preempt state jurisdiction. The FCC's proposal of rules is not the legal equivalent of the adoption of rules to preempt states' jurisdiction. Even if the proposed rules were adopted, the FCC may not confer on itself the power to ignore the plain meaning of the statutory words "ordinarily does move." The Commission is not obliged to follow the FCC's proposed rules that ignore the plain meaning of the statute enacted by Congress.

State jurisdiction unquestionably exists under NDCC §49-03.1 unless federal authorities have taken preemptory action. The PSC should not have surrendered or abandoned the state's jurisdiction in the absence of federal preemptive action.

State regulation of wireless telephone service is preempted only if the service is mobile service, and only if the service is provided to instruments that are capable of moving and that ordinarily do move. In the absence of a finding that the devices ordinarily do move, supported by evidence, the PSC's Conclusion of

Law No. 3 that "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Service" is erroneous and should be reversed.

Dated this 3rd day of January, 2000.

Respectfully submitted,

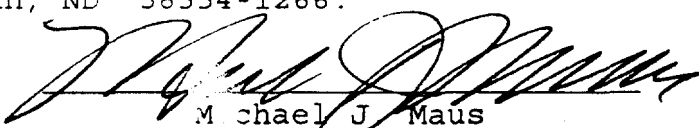
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CERTIFICATE OF MAILING

A true and correct copy of the foregoing **BRIEF OF APPELLANT CONSOLIDATED TELEPHONE COOPERATIVE** was on the 3rd day of January, 2000, mailed to Michele C. Farquhar, Hogan & Hartson, L.L.P., Columbia Square, 555 Thirteenth Street, N.W., Washington, D.C. 20004-1109; Gene DeJordy, Executive Director of Regulatory Affairs, Western Wireless Corporation, 3650 131st Avenue, S.E., Suite 400, Bellevue, WA 98006; and Thomas D. Kelsch, Attorney at Law, P.O. Box 1266, Mandan, ND 58554-1266.


Michael J. Maus

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Consolidated Telephone Cooperative,)

Appellant,)

vs.)

Western Wireless Corporation and
North Dakota Public Service
Commission,)

Appellees.)

NOTICE OF MOTION -
REQUEST FOR EXPEDITED RULING

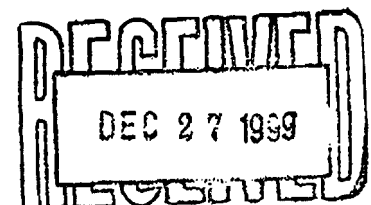
Case No. 08-99-C-02486/001

TO: Appellees and their attorneys.

You are hereby given notice that the attached Application (Motion) to Offer Additional Documents is being brought before the Court for determination pursuant to Rule 3.2 of the North Dakota Rules of Court and Rule 56, North Dakota Rules of Civil Procedure. You have ten (10) days after service upon you of the Motion within which to serve and file a response to this motion. If you fail to do so, the motion will be subject to summary ruling and the Court may grant the relief requested in the motion.

The attached motion is brought pursuant to Rule 3.2 of the North Dakota Rules of Court, which in part specifies that no hearing upon the motion is necessary unless requested by a party. Appellant does not request a hearing.

Appellant respectfully requests an expedited ruling in its



request to modify the briefing schedule to permit consideration of the new evidence.

Dated this 23rd day of December, 1999.

HARDY, MAUS & NORDSVEN
Attorneys for Appellant
137 First Avenue West, P.O. Box 570
Dickinson, ND 58602-0570
Telephone No: 701-483-4500

By:


Michael J. Maus (#03499)

CERTIFICATE OF MAILING

A true and correct copy of the foregoing NOTICE OF MOTION was on the 23rd day of December, 1999, mailed to Michele C. Farquhar, Hogan & Hartson, L.L.P., Columbia Square, 555 Thirteenth Street, N.W., Washington, D.C. 20004-1109; Gene DeJordy, Executive Director of Regulatory Affairs, Western Wireless Corporation, 3650 131st Avenue, S.E., Suite 400, Bellevue, WA 98006; and Thomas D. Kelsch, Attorney at Law, P.O. Box 1266, Mandan, ND 58554-1266.


Michael J. Maus

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Consolidated Telephone Cooperative,)

Appellant,)

vs.)

Western Wireless Corporation and)

North Dakota Public Service)

Commission,)

Appellees.)

Case No. 08-99-C-02486/001

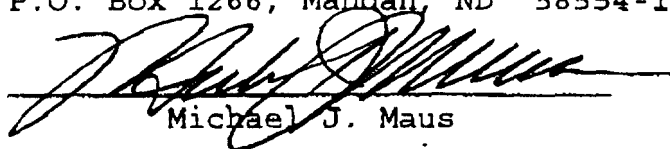
**APPLICATION (MOTION) AND BRIEF FOR LEAVE TO
OFFER ADDITIONAL DOCUMENTS**

Appellant, Consolidated Telephone Cooperative, pursuant to Section 28-32-18, NDCC, hereby moves the Court for leave to offer into evidence two (2) additional documents obtained from Western Wireless Corporation in discovery in Federal District Court Case No. A1-99-006. The documents were obtained subsequent to the Findings of Fact, Conclusions of Law and Order of the North Dakota Public Service Commission (PSC) in this case. These two (2) documents are a Cellular One Wireless Residential Service Agreement and the Wireless Residential Service Demo/Loaner Equipment Agreement. Copies of these documents are attached to this Motion.

Both of these documents are highly relevant and material in that they both specifically state that "the unit is intended to remain stationary." The unit is the device in dispute in the case. The issue before the PSC was whether these units were "mobile" or devices which "ordinarily do move". The relevant language in the document is highlighted

Section 28-32-18 of the North Dakota Century Code provides that when additional documents are relevant and material, and there

Washington, D.C. 20004-1109; Gene DeJordy, Executive Director of Regulatory Affairs, Western Wireless Corporation, 3650 131st Avenue, S.E., Suite 400, Bellevue, WA 98006; and Thomas D. Kelsch, Attorney at Law, P.O. Box 1266, Mandan, ND 58554-1266.


Michael J. Maus

